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NO. 85697-4

SUPREME COURT OF THE STATE OF WASHINGTON

LEASA LOWY,

Respondent,

v.

PEACEHEALTH, a Washington corporation; ST. JOSEPH HOSPITAL; and UNKNOWN JOHN DOES,

Petitioners.

SUPPLEMENTAL BRIEF OF PETITIONERS

Mary H. Spillane, WSBA #11981 Daniel W. Ferm, WSBA #11466 WILLIAMS, KASTNER & GIBBS PLLC Attorneys for Petitioners

Two Union Square 601 Union Street, Suite 4100⁻ Seattle, WA 98101 (206) 628-6600

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I. INTRODUCTION

It is undisputed that the quality improvement committee records at issue in this case – the Cubes database and the incident reports from which the database was derived – are information and documents created specifically for, and collected and maintained by, a St Joseph Hospital quality improvement committee. RCW 70.41.200(3) states that:

Information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action [Emphasis added.]

Yet, without regard to the plain statutory language that such information and documents "are not subject to review or disclosure, except as provided in this section," and without looking to see whether such review or disclosure is provided for in RCW 70.41.200, the Court of Appeals has decided that RCW 70.41.200(3) should be interpreted to require a hospital to conduct an "internal" review of its quality improvement records to respond, or to locate information to respond, to a medical malpractice plaintiff's discovery requests. See Lowy v. PeaceHealth, 159 Wn. App. 715, 719-23, 247 P.3d 7 (2011). Nothing in RCW 70.41.200 provides for such review. Under the plain language of the statute, unless RCW 70.41.200 provides for such review, the quality improvement records are not subject to such review. That should end the

inquiry and result in reversal of the Court of Appeals' decision.

II. STATEMENT OF FACTS

Leasa Lowy, a physician with privileges at St. Joseph Hospital in Bellingham, CP 9, 36 (p.10), and an employee of PeaceHealth and a member of its Quality and Patient Safety Team, CP 51 (¶3), sued PeaceHealth and St. Joseph, claiming a neurologic injury to her left arm from an IV infusion she received at St. Joseph, CP 6 (¶4.1). Peace Health owns and operates St. Joseph. See CP 5 (¶1.2).

A. <u>Discovery Sought by Dr. Lowy.</u>

Dr. Lowy served interrogatories and requests for production on St. Joseph seeking "incident reports, adverse outcome reports, sentinel event reports, or other similar reports" regarding complications of IV treatment, as well as the identity of persons employed by defendants who have access to records regarding adverse events associated with IV treatment at the Hospital. *See* CP 16-17. Defendants objected to that discovery on grounds that such documents or information were privileged and immune from discovery under the quality assurance and peer review privileges, RCW 4.24.250 and RCW 70.41.200 *et seq.* ¹ *See* CP 17.

Dr. Lowy did not move to compel responses to those discovery requests, but instead served a "Notice of Videotaped 30(b)(6) Deposition

¹ Some trial court briefs mistakenly cited RCW 70.41.200 as RCW 70.40.200. See, e.g., CP 17, 18.

Re: IV Infusions," CP 20-21, demanding that the hospital designate a representative to testify about, among other things, "any and all facts and information relating to . . . [i]ncidences of IV infusion complications and/or injuries at St. Joseph's Hospital for the years 2000-2008." CP 21.

B. The Hospital's Motion for Protective Order.

The Hospital sought a protective order as to that portion of the CR 30(b)(6) notice, CP 16-25, on grounds that "[t]he discovery sought was overly broad, unduly burdensome, and subject to and protected by the quality assurance and peer review privileges", CP 16, specifically RCW 4.24.250 and RCW 70.41.200 *et seq*, CP 18. As the Hospital explained:

[T]o provide a knowledgeable deponent to testify responsively to [the] request would require the deponent to either inspect confidential and privileged peer review and quality assurance documentation on any such injuries or complications or to review 9 years of medical records for all patients at St. Joseph's Hospital looking for reference to IV infusion injury or complication. [CP 17.]

With its motion, the Hospital submitted the declaration of Mary Whealdon, CP 25, the Risk Manager at St. Joseph, who explained:

3. I have investigated whether any non-privileged documents or medical record database exists which could produce responsive information to this deposition request. While St. Joseph Hospital has an electronic medical record system, that system does not have search field capability to query and retrieve the information requested from patient records. Consequently, months of man and woman power would be required to be expended to go page-by-page through many thousands of St. Joseph Hospital patient records over that 8-year period of time to look for an

indication in the medical records of a complication or injury potentially associated with IV infusion.

- 4. There are no documents, other than quality assurance and peer review records, which may contain responsive information for a witness to provide testimony in response to the 30(b)(6) ... question.
- 5. All such documents maintained by the quality assurance and peer review committees of St. Joseph Hospital were sent to and maintained confidentially by such committees in accordance with the quality assurance and peer review statutes, and are confidential from any dissemination, pursuant to those statutes. [CP 25.]

In response to the Hospital's motion, CP 26-44, Dr. Lowy did not contest that it would be unduly burdensome for the hospital to have to conduct a record-by-record search of medical records to identify complications or injuries potentially associated with IV infusions over the requested 8-year period.² Rather, she claimed that the quality assurance and peer review statutes relied upon by the Hospital, do not "prohibit a defendant from reviewing its QA [quality assurance]³ files in order to determine whether the files contain documents which were not created specifically for the committee." CP 32. She asserted that: "If there are medical records in the [quality assurance] file, or information from

² Dr. Lowy has conceded, App. Br. at 6, that she did not contest the claim that such a search would be unduly burdensome. Nor has she maintained or shown that "incidences of IV infusion complications and/or injuries" would be reflected in patient medical records in a form that would enable a person reviewing the thousands of patient medical records to identify them as such.

³ The terms "quality assurance" or "QA" and "quality improvement" or "QI" have been used interchangeably in the parties' briefing.

original sources in the file, then those records and that information are not privileged and must be produced." CP 33.

Citing her own deposition testimony, CP 41, Dr. Lowy also claimed that, Dr. Stephanie Jackson, the Medical Director of Patient Safety (who, along with Dr. Lowy, is a member of the Quality and Safety Leadership Team), had shown her "a computer program utilizing a list format which depicted prior incidences of IV injury at St. Joseph," CP 29, which could be reviewed to gain knowledge to use to produce responsive non-privileged information at a CR 30(b)(6) deposition. CP 33-34.

In its reply, CP 45-52, the Hospital explained that the database – the "Cubes" database – that Dr. Lowy alleged would synthesize the information she sought consisted of materials "created, kept and maintained for the sole purposes of quality assurance and peer review," and "derived from incident reports, which are themselves quality assurance and peer review documents." CP 46-47, CP 51-52. As Dr. Jackson testified in her declaration, CP 51-52:

- 4. I have been informed that Dr. Lisa Lowy testified I showed her information on my laptop computer concerning IV infusion incidents at PeaceHealth.
- 5. Dr. Lowy asked me whether PeaceHealth tracked IV infusion incidents. Since Dr. Lowy is also a member of the Quality and Safety Leadership Team at PeaceHealth and entitled to access Quality Assurance documents, I told her that such tracking does occur and showed her a screen on my computer from the Quality Assurance database with

an example of the tracking format. I told Dr. Lowy that the screen I showed her was part of the PeaceHealth "Cubes" database and is material created, kept and maintained for the sole purposes of quality assurance and peer review.

- 6. The information in the Cubes database is derived from incident reports, which are themselves quality assurance and peer review documents.
- 7. Other than quality assurance and peer review documents, there is no source of information about IV infusion incidents at St. Joseph's Hospital or PeaceHealth available, other than patient medical records. [CP 51-52.]

The Hospital reiterated that the only way to access the nine years of information Dr. Lowy sought, without breaching the quality improvement database, was to physically search thousands of medical records. CP 47-48.

The trial court initially denied the Hospital's motion for protective order and ordered a designated agent of the Hospital to "review all relevant records of the quality assurance and peer review committee for the period January 1, 2003 through March 31, 2009," and to disclose the "underlying facts and explanatory circumstances charted in hospital records relating to alleged injuries, complications, malfunctions or adverse events associated with any IV infusions." CP 54.

C. <u>The Hospital's Motion for Reconsideration</u>.

The Hospital moved for reconsideration, CP 55-82, *see also* CP 96-101, explaining that the actions the trial court had mandated – to "review all relevant records of the quality assurance and peer review committee" to search for and obtain data about IV infusion incidents, and

then disclose underlying facts and explanatory circumstances charted in hospital records relating to alleged injuries, complications, malfunctions or adverse events associated with any IV infusions — were in direct contravention of RCW 70.41.200(3)'s mandate that, subject to certain exceptions not applicable in this case, "[i]nformation and documents, including complaints and incident reports, created specifically for, and collected and maintained by a quality improvement committee are not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action," as well as RCW 4.24.250's mandate that, subject to an inapplicable exception, "reports, and written records" of regularly constituted hospital review committees whose duty it is to review and evaluate the quality of patient care "are not subject to review or disclosure, or subpoena or discovery proceedings in any civil action." CP 59-62.

With its motion for reconsideration, the Hospital submitted another declaration of Dr. Jackson, further detailing the Hospital's regularly constituted quality improvement committees and the "Cubes" quality improvement database. She testified:

3. I am making this Declaration to provide greater specificity regarding the creation, use and type of information on the Cubes data base, and to emphasize it is information collected, maintained and used solely for Quality Improvement (QI) by PeaceHealth OI Committees.

4. The Cubes database is information and documents created specifically for, and collected and maintained solely by quality improvement committees. In the case of incidences of adverse drug reactions [such as possible IV infiltrations], those quality improvement committees are the Pharmacy and Therapeutic Committee and the Medication Safety Team. Both of these regularly constituted committees are established under RCW 70.41.200 and similar statutes, and the Cubes data, in spreadsheet format, are reports and written records of those two regularly constituted committees whose duty it is to review and evaluate the quality of patient care under RCW 4.24.250 and similar statutes.

* * *

- 6. Throughout the process of input and use of the information in the Cubes database by the QI committees are statements of its purpose and such statements include that the report is confidential and privileged under state law because it is a quality improvement report for quality improvement and peer review purposes. This confidentiality and privilege is maintained by passwords to preclude dissemination from the Cubes database to non-committee members.
- 7. I attach the Medical Staff Bylaws and Rules and Regulations of St. Joseph Hospital [Bylaws]. At page 4, section 3A of the Bylaws, the outline of the Medical Staff committees of the Hospital that carry our peer review and other performance improvement functions are delegated to the Medical Staff by the Board. At page 9, section 3.K. the Pharmacy and Therapeutics Committee is established to "conduct ongoing reviews of adverse drug events reported through the Hospital Systems." This review is the QI committee using the Cubes database.
- 8. The information about adverse drug events on the Cubes [database] is not patient medical records or excerpts of patient medical records; rather it is summary information reflecting the deliberative process and evaluation of the QI committee analyzing the occurrence in the performance of its QI mandate. Information such as severity, type of event,

outcome and root cause is assessed. The committees evaluate improvement opportunities based on this information. However, the only information containing all the underlying facts and circumstances of any such events is the patient medical records. [CP 65-66.]

Agreeing with the Hospital's analysis, the trial court granted reconsideration, CP 103-04, reversed its order denying the Hospital's motion for a protective order, and held that "the plain language of RCW 70.41.200(3) compels the conclusion that <u>any</u> kind of disclosure, whether of committee opinion or underlying factual complaints, shall not be disclosed." CP 104 (emphasis in original).

D. The Court of Appeals Decision.

Dr. Lowy moved for discretionary review of the order granting reconsideration. See CP 105-110. The Commissioner denied the motion for discretionary review, but the Court of Appeals granted Dr. Lowy's motion to modify the commissioner's ruling. The Court of Appeals then issued its published decision, Lowy v. PeaceHealth, 159 Wn. App. 715, 247 P.3d 7 (2011), reversing the trial court. Without focusing on, or identifying any ambiguity in, the plain language of RCW 70.41.200(3) which makes clear that quality improvement committee records "are not subject to review or disclosure, except as provided in this section [RCW 70.41.200]," and without identifying any portion of RCW 70.41.200 that so provides, the Court of Appeals construed the quality improvement

privilege set forth in RCW 70.41.200(3) to enable a medical malpractice plaintiff to require a hospital to conduct an internal review of its quality improvement committee records to locate and produce information in response to discovery requests that it could not otherwise have obtained without a concededly unduly burdensome page-by-page search of nine-years worth of hospital medical records. *Id.*

III. ARGUMENT WHY THE COURT OF APPEALS DECISION SHOULD BE REVERSED

A. Under the Plain Language of RCW 70.41.200(3), the Database at Issue Is Not Subject to Review or Disclosure, Except as Provided in RCW 70.41.200, and Nothing in RCW 70.41.200 Provides for Its "Internal" Review to Enable a Hospital to Respond to a Medical Malpractice Plaintiff's Discovery Requests.

With its enactment in 1986 of RCW 70.41.200 et seq, the Legislature mandated that all hospitals in Washington "maintain a coordinated quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice." RCW 70.41.200(1). The coordinated quality improvement program must include, among other things: "[t]he establishment of a quality improvement committee with the responsibility to review the services rendered in the hospital, both retrospectively and prospectively, in order to improve the quality of medical care of patients and to prevent medical malpractice...," RCW 70.41.200(1)(a), "[a] medical staff privileges sanction procedure through

which credentials, physical and mental capacity, and competence in delivering health care services are periodically reviewed as part of an evaluation of staff privileges;" RCW 70.41.200(1)(b); and "[t]he maintenance and continuous collection of information concerning the hospital's experience with negative health care outcomes and incidents injurious to patients . . .," RCW 70.41.200(1)(e).4

In mandating that hospitals engage in such quality improvement activities and to facilitate their ability to do so effectively, the Legislature not only provided immunity protection to participants in the quality improvement process, RCW 70.41.200(2),⁵ but also enacted a companion privilege that absolutely protects hospitals from the risk that the quality improvement documents and information they were mandated to collect, maintain, and evaluate would provide a discovery clearinghouse, or be used against them, in medical malpractice cases. That privilege, RCW 70.41.200(3), unambiguously provides:

Information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are

Any person who, in substantial good faith, provides information to further the purposes of the quality improvement and medical malpractice prevention program or who, in substantial good faith, participates on the quality improvement committee shall not be subject to an action for civil damages or other relief as a result of such activity. . . .

⁴ The complete text of RCW 70.41.200 is attached as Appendix A.

⁵ RCW 70.41.200(2) provides:

not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action, and no person who was in attendance at a meeting of such committee or who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted or required to testify in any civil action as to the content of such proceedings or the documents and information prepared specifically for the committee. This subsection does not preclude: (a) In any civil action, the discovery of the identity of persons involved in the medical care that is the basis of the civil action whose involvement was independent of any quality improvement activity; (b) in any civil action, the testimony of any person concerning the facts which form the basis for the institution of such proceedings of which the person had personal knowledge acquired independently of such proceedings; (c) in any civil action by a health care provider regarding the restriction or revocation of that individual's clinical or staff privileges, introduction into evidence information collected and maintained by quality improvement committees regarding such health care provider; (d) in any civil action, disclosure of the fact that staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions; or (e) in any civil action, discovery and introduction into evidence of the patient's medical records required by regulation of the department of health to be made regarding the care and treatment received. [Emphasis added.]

It is undisputed that the database at issue and the incident reports from which it was derived are information and documents created specifically for, and collected and maintained by, a hospital quality improvement committee. Thus, under the plain language of the statute, both the database and the incident reports "are not be subject to review or

disclosure, except as provided in this section [RCW 70.41.200]"

RCW 70.41.200(3) (emphasis added).

Nothing in RCW 70.41.200 provides for the review (internal or external) of the quality improvement database (or the incident reports) for the purpose of locating and producing information to respond to a medical malpractice plaintiff's discovery requests. The only "review or disclosure" of information and documents created specifically for, and collected and maintained by, a quality improvement committee provided for in RCW 70.41.200 is (a) review for purposes of the quality improvement activities set forth in RCW 70.41.200(1); (b) the five types of discovery or disclosures (none of which are applicable in this case) specifically not precluded under RCW 70.41.200(3)(a)-(e); (c) review and audit by the medical quality assurance commission or the board of osteopathic medicine and surgery as provided in RCW 70.41.200(6); (d) review and audit by the Department of Health, the Joint Commission on Accreditation of Health Care Organization, or other accrediting organization as provided in RCW 70.41.200(7); and (e) the sharing of information and documents with one or more other coordinated quality improvement committees allowed by RCW 70.41.200(8).

Nowhere does RCW 70.41.200 provide for, much less require, a hospital to conduct an internal review of information or documents created

specifically for, and collected and maintained by, a hospital quality improvement committee in order to respond, or to locate information to respond, to a medical malpractice plaintiff's discovery requests. And for good reason — it hardly encourages or incentivizes hospitals to engage in critical self-assessment and conduct diligent and thorough maintenance and collection of information about negative outcomes and incidents injurious to patients, if such information, documents or databases used to maintain and collect such information, created specifically for, and collected and maintained by, their quality improvement committees, becomes a handy tool for discovery that would not otherwise be available to plaintiffs in suits against hospitals.

RCW 70.41.200(3) plainly states that "[i]information or documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure, except as provided in this section [RCW 70.41.200]...." RCW 70.41.200 does not provide for review (internal or external) of quality improvement committee information or documents to aid medical malpractice plaintiffs in obtaining discovery, or to enable the hospital to locate and produce information that it otherwise would not have been able to locate and produce. The Court of Appeals'

decision to the contrary is at odds with the plain language of the statute and should be reversed.

B. The Plain Meaning of the Statute Should Control and Should be the End of the Inquiry.

Statutory interpretation is a question of law reviewed de novo.... The primary objective of any statutory construction inquiry is "to ascertain and carry out the intent of the Legislature."... Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself....

Bowie v. Dep't of Revenue, 171 Wn.2d 1, 10, 248 P.3d 504 (2011) (citations omitted). "The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, we "give effect to that plain meaning." State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (quoting State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). "Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." Unruh v. Cacchiotti, ___ Wn.2d ___, __ P.3d ___, 2011 Wash. LEXIS 592, *20 (2011) (quoting Christensen v. Ellsworth, 162 Wn.2d 365, 373, 173 P.3d 228 (2007)). If the meaning of the statute is plain, the court's inquiry "is at an end." Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., PLLC, 168 Wn.2d 421, 433, 228 P.3d 1260 (2010).

While the Court of Appeals recognized these principles of statutory construction, and even cited Columbia Physical Therapy, the Court of Appeals failed to apply them. Instead, without focusing on, or identifying any ambiguity in, the plain language of RCW 70.41.200(3). which states that "[i]information and documents, including complaints and incident reports, created specifically for and collected and maintained by a quality improvement committee are not subject to review or disclosure, except as provided in this section [RCW 70.41.200]..." (emphasis added), and without looking to see if anything in RCW 70.41.200 provided for such review, the Court of Appeals, under the guise of strictly construing the privilege afforded by RCW 70.41.200(3), held that Dr. Lowy could force the hospital to conduct an internal review of its quality improvement database to locate and produce information in response to her discovery requests that the hospital otherwise would not have been able to locate and produce. In so doing, the Court of Appeals erred and its decision should be reversed.

That a statute is in derogation of common law or a general policy favoring discovery, and thus "is to be strictly construed and limited to its purposes," *Coburn v. Seda*, 101 Wn.2d 270, 276, 677 P.3d 173 (1984) (interpreting RCW 4.24.250) does not give a court license to add to a statute words or exceptions that are not there, or to fail to give effect to

words that are there. Courts "cannot not add words or clauses to a statute when the legislature has chosen not to include such language." Dot Foods, Inc. v. Dep't of Revenue, 166 Wn.2d 912, 920, 215 P.3d 185 (2009); Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (courts "must not add words where the legislature has chosen not to include them," and must "construe statutes such that all of the language is given effect").

Here, the Court of Appeals failed to focus on the statutory language which makes clear that records of quality improvement committees "are not subject to review or disclosure, except as provided in this section," and thus never addressed what "review or disclosure" is provided for in RCW 70.41.200. Instead it focused too narrowly on only that portion of the language of the statute that states that such records "are not subject to review or disclosure." Lowy, 159 Wn. App. at 720 (end of ¶ 11). Without considering what exceptions to that prohibition on review or disclosure the legislature had provided for in RCW 70.41.200 (which include internal review for the quality improvement activities specified in RCW 70.41.200(1), five types of discovery or disclosures not precluded in RCW 70.41.200(3)(a)-(e), and three types of external review permitted by RCW 70.41.200(6)-(8)), the Court of Appeals then concluded that the statute did not "expressly draw a distinction between internal and external

review," and therefore the statute should be "most reasonably interpreted simply as prohibiting review of committee records by persons outside the hospital." *Lowy*, 159 Wn. App. at 720 (¶¶ 12, 13)

Had the Court of Appeals paid attention to the "except as provided in this section" language that follows the prohibition on "review or disclosure," and looked to see what review or disclosure was permitted by RCW 70.41.200, it would have realized that, contrary to its analysis, Lowy, 159 Wn. App. at 720 (¶ 12), the exceptions to the prohibition on review or disclosure of quality improvement records that the legislature set forth in RCW 70.41.200 did include internal review for the quality improvement purposes set forth in RCW 70.41.200, but did not include internal review to facilitate the location of hospital records or other information that might be responsive to a medical malpractice plaintiff's discovery requests. The Court of Appeals' strained construction of "review or disclosure" misses the mark. It ignores the language of the statute that makes clear that it is "review or disclosure, except as provided in this section" that is prohibited.

Still focusing too narrowly on what the legislature meant by its "prohibition on 'review or disclosure," rather than its "prohibition on 'review or disclosure, except as provided in this section," the Court of Appeals went on an unnecessary foray into legislative history, and

concluded that the 2005 amendment to RCW 70.41.200(3), Laws of 2005, ch. 291, § § 1-3, that added the prohibition against "review or disclosure, except as provided in this section," would not have enjoyed the support of the plaintiffs' bar "if it had been intended to prohibit internal review as well as external review of quality assurance records." *Lowy*, 159 Wn. App. at 723. The Court of Appeals then, citing the Senate Bill Report, Engrossed H.B. 2254 (Wash. 2005), concluded that "[t]he purpose of the 2005 amendment was simply to ensure that the records could not be released to the public in some extrajudicial context, that is, outside of a civil action." *Lowy*, 159 Wn. App. at 723. In so doing, however, the Court of Appeals ignored what the "Summary of Bill" section of the Senate Bill Report it cited states: "The review or disclosure of information and documents specifically created for, and collected and maintained by, quality improvement and peer review committees is prohibited *unless there is a specific exception* [emphasis added]."

Nevertheless, because the language of RCW 70.41.200(3) is plain and unambiguous, and makes clear that quality improvement records "are not subject to review or disclosure, except as provided in this section," there was no need for the Court of Appeals to resort to legislative history to discern legislative intent. It is only when a statute is susceptible to more than one reasonable interpretation that a court "may resort to

statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 498, 210 P.3d 308 (2009) (quoting Christensen v. Ellsworth, 162 Wn.2d at 373). "If the plain language is subject to only one interpretation, our inquiry ends because plain language does not require construction." Bowie, 171 Wn.2d at 11 (citing State v. Thornton, 119 Wn.2d 578, 580, 835 P.2d 216 (1992)).

IV. CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief of Respondents and the Petition for Review, the Court of Appeals' decision should be reversed, and the trial court's June 16, 2009 order on reconsideration prohibiting Dr. Lowy from requiring a St. Joseph CR 30(b)(6) deponent to review the hospital's quality improvement database to locate and provide information responsive to Dr. Lowy's discovery requests should be reinstated.

RESPECTFULLY SUBMITTED this 11th day of August, 2011.

WILLIAMS, KASTNER & GIBBS PLLC

Mary H. Spillane, WSBA#11981

Daniel W. Eerm, WSBA #11466

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 11th day of August, 2011, I caused a true and correct copy of the foregoing document, "Supplemental Brief of Petitioners," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Petitioner: Joel D. Cunningham, WSBA #5586 J. Andrew Hoyal, II, WSBA #21349 LUVERA LAW FIRM 701 Fifth Ave, Suite 6700 Seattle WA 98104 Ph: (206) 467-6090 joel@luveralawfirm.com andy@luveralawfirm.com	SENT VIA: ☐ Fax ☐ ABC Legal Services ☐ Express Mail ☑ Regular U.S. Mail ☑ E-file / E-mail
Council for Patitionary	073 FB 777 .
CONTROL TOP BOTITIONOWI	CITATUR TOTA.

Counsel for Petitioner:
Michael J. Myers, WSBA #5291
MICHAEL J. MYERS, PLLC
601 W. Main, Suite 1102
Spokane, WA 99201
Ph: (509) 624-8988
michael@myerslegal.net

Co-counsel for Respondents:
John C. Graffe, Jr., WSBA # 11835
JOHNSON GRAFFE KEAY MONIZ
& WICK
925 - 4th Ave., Suite 2300
Seattle WA 98104-1145
Ph: (206) 223-4770
johng@jgkmw.com

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Co-counsel for Respondents: Stephen C. Yost, pro hac vice CAMPBELL, YOST, CLARE & NORELL, P.C. 101 N. First Ave., Suite 2500 Phoenix, AZ 85003-0001 Ph: (602) 322-1606 syost@cycn-phx.com	SENT VIA: ☐ Fax ☐ ABC Legal Services ☐ Express Mail ☑ Regular U.S. Mail ☑ E-file / E-mail
Counsel for Amici Curiae WSHA, et al.: Michael F. Madden, WSBA #08747 Bennett Bigelow & Leedom PS 1700 7th Ave Ste 1900 Seattle WA 98101-1355 Ph: (206) 622-5511 mmadden@bbllaw.com	SENT VIA: ☐ Fax ☐ ABC Legal Services ☐ Express Mail ፫ Regular U.S. Mail ☑ E-file / E-mail

DATED this 11th day of August, 2011, at Seattle, Washington.

Carrie A. Custer, Legal Assistant



1 of 1 DOCUMENT

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*** Current with legislation from the 2011 Regular Session ***

*** effective through June 30, 2011 ***

TITLE 70. PUBLIC HEALTH AND SAFETY CHAPTER 70.41. HOSPITAL LICENSING AND REGULATION

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 70.41.200 (2011)

§ 70.41,200. Quality improvement and medical malpractice prevention program -- Quality improvement committee -- Sanction and grievance procedures -- Information collection, reporting, and sharing

- (1) Every hospital shall maintain a coordinated quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. The program shall include at least the following:
- (a) The establishment of a quality improvement committee with the responsibility to review the services rendered in the hospital, both retrospectively and prospectively, in order to improve the quality of medical care of patients and to prevent medical malpractice. The committee shall oversee and coordinate the quality improvement and medical malpractice prevention program and shall ensure that information gathered pursuant to the program is used to review and to revise hospital policies and procedures;
- (b) A medical staff privileges sanction procedure through which credentials, physical and mental capacity, and competence in delivering health care services are periodically reviewed as part of an evaluation of staff privileges;
- (c) The periodic review of the credentials, physical and mental capacity, and competence in delivering health care services of all persons who are employed or associated with the hospital;
- (d) A procedure for the prompt resolution of grievances by patients or their representatives related to accidents, injuries, treatment, and other events that may result in claims of medical malpractice;
- (e) The maintenance and continuous collection of information concerning the hospital's experience with negative health care outcomes and incidents injurious to patients including health care-associated infections as defined in *RCW* 43.70.056, patient grievances, professional liability premiums, settlements, awards, costs incurred by the hospital for patient injury prevention, and safety improvement activities;
- (f) The maintenance of relevant and appropriate information gathered pursuant to (a) through (e) of this subsection concerning individual physicians within the physician's personnel or credential file maintained by the hospital;
- (g) Education programs dealing with quality improvement, patient safety, medication errors, injury prevention, infection control, staff responsibility to report professional misconduct, the legal aspects of patient care, improved communication with patients, and causes of malpractice claims for staff personnel engaged in patient care activities; and
 - (h) Policies to ensure compliance with the reporting requirements of this section.

- (2) Any person who, in substantial good faith, provides information to further the purposes of the quality improvement and medical malpractice prevention program or who, in substantial good faith, participates on the quality improvement committee shall not be subject to an action for civil damages or other relief as a result of such activity. Any person or entity participating in a coordinated quality improvement program that, in substantial good faith, shares information or documents with one or more other programs, committees, or boards under subsection (8) of this section is not subject to an action for civil damages or other relief as a result of the activity. For the purposes of this section, sharing information is presumed to be in substantial good faith. However, the presumption may be rebutted upon a showing of clear, cogent, and convincing evidence that the information shared was knowingly false or deliberately misleading.
- (3) Information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action, and no person who was in attendance at a meeting of such committee or who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted or required to testify in any civil action as to the content of such proceedings or the documents and information prepared specifically for the committee. This subsection does not preclude: (a) In any civil action, the discovery of the identity of persons involved in the medical care that is the basis of the civil action whose involvement was independent of any quality improvement activity; (b) in any civil action, the testimony of any person concerning the facts which form the basis for the institution of such proceedings of which the person had personal knowledge acquired independently of such proceedings; (c) in any civil action by a health care provider regarding the restriction or revocation of that individual's clinical or staff privileges, introduction into evidence information collected and maintained by quality improvement committees regarding such health care provider; (d) in any civil action, disclosure of the fact that staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions; or (e) in any civil action, discovery and introduction into evidence of the patient's medical records required by regulation of the department of health to be made regarding the care and treatment received.
- (4) Each quality improvement committee shall, on at least a semiannual basis, report to the governing board of the hospital in which the committee is located. The report shall review the quality improvement activities conducted by the committee, and any actions taken as a result of those activities.
- (5) The department of health shall adopt such rules as are deemed appropriate to effectuate the purposes of this section.
- (6) The medical quality assurance commission or the board of osteopathic medicine and surgery, as appropriate, may review and audit the records of committee decisions in which a physician's privileges are terminated or restricted. Each hospital shall produce and make accessible to the commission or board the appropriate records and otherwise facilitate the review and audit. Information so gained shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (3) of this section. Failure of a hospital to comply with this subsection is punishable by a civil penalty not to exceed two hundred fifty dollars.
- (7) The department, the joint commission on accreditation of health care organizations, and any other accrediting organization may review and audit the records of a quality improvement committee or peer review committee in connection with their inspection and review of hospitals. Information so obtained shall not be subject to the discovery process, and confidentiality shall be respected as required by subsection (3) of this section. Each hospital shall produce and make accessible to the department the appropriate records and otherwise facilitate the review and audit.
- (8) A coordinated quality improvement program may share information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee or a peer review committee under RCW 4.24.250 with one or more other coordinated quality improvement programs maintained in accordance with this section or RCW 43.70.510, a coordinated quality improvement committee maintained by an ambulatory surgical facility under RCW 70.230.070, a quality assurance committee maintained in accordance with RCW 18.20.390 or 74.42.640, or a peer review committee under RCW 4.24.250, for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. The privacy protections of chapter 70.02 RCW and the federal health insurance portability and accountability act of 1996 and its implementing regulations apply to the sharing of individually identifiable patient information held by a coordinated quality improvement program. Any rules necessary to implement this section shall meet the requirements of applicable federal and state privacy laws. Information and documents disclosed by one coordinated quality improvement program to another coordinated quality improvement program or a peer review committee under RCW 4.24.250 and any information and documents disclosed by one coordinated quality improvement program to another coordinated quality improvement program or a peer review committee under RCW 4.24.250 and any information and documents disclosed by one coordinated quality improvement program to another coordinated quality improvement program or a peer review committee under RCW 4.24.250 and any information and documents disclosed by one coordinated quality improvement program or a peer review committee under RCW 4.24.250 and any information and documents disclosed by one coordinated quality improvement program or a peer review committee under RCW 4.24.250 and any information and documents disclosed

ments created or maintained as a result of the sharing of information and documents shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (3) of this section, RCW 18.20.390 (6) and (8), 74.42.640 (7) and (9), and 4.24.250.

- (9) A hospital that operates a nursing home as defined in *RCW 18.51.010* may conduct quality improvement activities for both the hospital and the nursing home through a quality improvement committee under this section, and such activities shall be subject to the provisions of subsections (2) through (8) of this section.
 - (10) Violation of this section shall not be considered negligence per se.

HISTORY: 2007 c 273 § 22; 2007 c 261 § 3. Prior: 2005 c 291 § 3; 2005 c 33 § 7; 2004 c 145 § 3; 2000 c 6 § 3; 1994 sp.s. c 9 § 742; 1993 c 492 § 415; 1991 c 3 § 336; 1987 c 269 § 5; 1986 c 300 § 4.

NOTES: REVISER'S NOTE: This section was amended by 2007 c 261 § 3 and by 2007 c 273 § 22, each without reference to the other. Both amendments are incorporated in the publication of this section under *RCW 1.12.025(2)*. For rule of construction, see *RCW 1.12.025(1)*.

EFFECTIVE DATE -- IMPLEMENTATION -- 2007 C 273; See RCW 70.230.900 and 70.230.901.

FINDING -- 2007 C 261: See note following RCW 43.70.056.

FINDINGS -- 2005 C 33: See note following RCW 18.20.390.

SEVERABILITY -- HEADINGS AND CAPTIONS NOT LAW -- EFFECTIVE DATE -- 1994 SP.S. C 9: See RCW 18.79.900 through 18.79.902.

FINDINGS -- INTENT -- 1993 C 492: See notes following RCW 43.20.050.

SHORT TITLE -- SEVERABILITY -- SAVINGS -- CAPTIONS NOT LAW -- RESERVATION OF LEGISLATIVE POWER -- EFFECTIVE DATES -- 1993 C 492: See RCW 43.72.910 through 43.72.915.

LEGISLATIVE FINDINGS -- SEVERABILITY -- 1986 C 300: See notes following RCW 18.57.245.

CROSS REFERENCES.

Board of osteopathic medicine and surgery: Chapter 18.57 RCW.

Medical quality assurance commission: Chapter 18.71 RCW.

EFFECT OF AMENDMENTS.

2007 c 273 § 22, effective July 1, 2009, in (8), added "a coordinated quality improvement committee maintained by an ambulatory surgical facility under *RCW* 70.230.070."

2007 c 261 § 3, effective July 22, 2007, in (1)(e), added "including health care-associated infections as defined *RCW* 43.70.056"; and in (1)(g), added "infection control."

2005 c 291 § 3, effective July 24, 2005, inserted "review or disclosure, except as provided in this section, or" in the first sentence of (3).

2005 c 33 § 7, effective July 24, 2005, inserted "a quality assurance committee maintained in accordance with *RCW* 18.20.390 or 74.42.640" in the first sentence of (8) and "18.20.390 (6) and (8), and 74.42.640 (7) and (9)" in the last sentence of (8), and added (9).

2004 c 145 § 3, effective June 10, 2004, in subsection (1)(g), inserted "medication errors" following "patient safety"; in subsection (2), added the last three sentences; added present subsection (8); and redesignated former subsection (8) as subsection (9).

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Medical Facility Licensing

JUDICIAL DECISIONS

ANALYSIS Applicability

APPLICABILITY.

This section does not apply to internal investigation documents which were created prior to the statute's enactment. Adox v. Children's Orthopedic Hosp. & Medical Ctr., 123 Wn.2d 15, 864 P.2d 921 (1993).

RESEARCH REFERENCES

WASHINGTON LAW REVIEW.

Revising Washington's corporate practice of medicine doctrine. 71 Wash. L. Rev. 403 (1996).

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.

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Attached for filing in .pdf format is the Supplemental Brief of Petitioners in *Lowy v. PeaceHealth,* Supreme Court Cause No. 85697-4. The attorneys filing this brief are Mary Spillane, (206) 628-6656, WSBA No. 11981, e-mail address: mspillane@williamskastner.com and Dan Ferm, (206) 233-2908, WSBA No. 11466, e-mail address: dferm@williamskastner.com.

Respectfully submitted,

Carrie A. Custer

Legal Assistant to Mary H. Spillane, Daniel W. Ferm and Arissa M. Peterson Williams Kastner
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Main: 206.628.6600

Direct 206.628.2766 Fax: 206.628.6611

<u>ccuster@williamskastner.com</u> <u>www.williamskastner.com</u>

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